

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

<b>STEPHANIE MERCIER,</b>	)	
<b>AUDRICIA BROOKS,</b>	)	
<b>DEBORAH PLAGEMAN,</b>	)	
<b>JENNIFER ALLRED,</b>	)	
<b>MICHELE GAVIN,</b>	)	<b>Case No. 12-920 C</b>
<b>STEPHEN DOYLE on behalf of</b>	)	
<b>themselves and all others similarly</b>	)	<b>Judge Elaine D. Kaplan</b>
<b>situated,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>THE UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Defendant.</b>	)	

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**GOVERNMENT MOTION TO AMEND SCHEDULING ORDER**

Pursuant to Rules 6(b) and 7(b) of the Rules of the United States Court of Federal Claims, defendant, the United States, respectfully requests that the Court enter an Amended Scheduling Order to revise deadlines set forth under the Court's March 27, 2020 Scheduling Order (ECF No. 189) (Scheduling Order). Counsel for plaintiffs has indicated that plaintiffs will oppose our motion.

The Scheduling Order currently establishes May 15, 2020, as the deadline for plaintiffs' expert report, June 15, 2020, for the defendant's expert report, and July 15, 2020, for the close of discovery. The Government respectfully requests that the Court revise these deadlines as follows:

Plaintiffs' expert report due: July 15, 2020

Defendants' expert report due: August 15, 2020

Close of Discovery: September 15, 2020

A revised scheduling order is necessary because the Government is still in the process of collecting and producing documents that are relevant to the experts' damages analyses. Specifically, plaintiffs have requested the production of documents for approximately 130 class members. Counsel for the Government has notified plaintiffs' counsel that the Government anticipates producing sign-on/sign-off data, notes and orders, and other electronic medical records the week of May 18, 2020, which is after plaintiffs' expert report is due. That production will consist of more than 5000 records and 37 million images, which includes documents that are responsive to plaintiffs' requests and replacement files for documents that were previously produced that were corrupted. And the Government is still in the process of collecting tour of duty records for the 130 class members.

The delay in collecting and producing these documents is attributable to the significant impact that COVID-19 has had on the Veterans Health Administration (VHA) and the resources that the agency has been required to devote to this pandemic. In addition to the VHA's primary mission of providing health care to our Nation's veterans, the agency also serves as a back-up health system for civilians in the event of an emergency during the COVID-19 pandemic. The agency has shifted resources and personnel to assist in the Federal government's response to the COVID-19 pandemic by supporting national, state, and local emergency management, public health, safety and homeland security efforts. As of May 5, 2020, VHA has accepted 29 mission assignments<sup>1</sup> from the Federal Emergency Management System (FEMA) and the U.S. Department of Health and Human Services (HHS), in addition to VHA's other duties and obligations. Many

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<sup>1</sup> A Mission Assignment is a work order issued by FEMA to another Federal agency directing completion of a specific task, and citing funding, other managerial controls, and guidance. It is given in anticipation of, or in response to, a Presidential Declaration of an Emergency Major Disaster or National Special Security Event.

VHA employees who support this litigation, ranging from VHA human resource professionals to information and technology employees, have had to transition from their regular work duties to help the agency prepare its emergency response to COVID-19. As a result, the VHA's shift in priorities – necessitated by this crisis – has caused a temporary delay in the agency's efforts to respond to discovery requests as expeditiously as it otherwise would.

Although we appreciate plaintiffs' concern about moving this case forward in light of how long this matter has been in litigation, it is in the interest of both parties to ensure that the parties' experts have at their disposal all of the relevant data and documentation for purposes of their damages' analyses. The requested extension is necessary to allow the agency to meet its discovery obligations in the context of the agency's required prioritization of the health of our veterans and the public during this national emergency.

An extension is also necessary because more time is required to permit the parties to complete depositions. The parties have completed one merits discovery deposition – the deposition of Dr. Hardeep Singh – on January 7, 2020. The Government intends to take the depositions of all six named plaintiffs, who are geographically dispersed. Plaintiffs likely will want to take additional merits discovery depositions as well. The National Courts Section has recently issued guidance to its attorneys regarding the conduct of depositions, which requires attorneys to seek enlargements of discovery to avoid the prospect of having to take or defend depositions during this period of quarantine and state-ordered lockdowns. The rationale behind this directive is that it is disadvantageous to both parties to not be in the same room as the witness you are tasked with defending or the witness whose deposition you must take. To be clear, we are not seeking an indefinite stay of the discovery schedule. To the contrary, we are seeking a 60-day

extension of that schedule, which hopefully, will provide sufficient time for the easing of the pandemic-related restrictions, and permit the scheduling and taking of the remaining depositions.

For these reasons, we respectfully request that the Court grant our motion to amend the scheduling order and adopt the revised deadlines contained herein.

Respectfully Submitted,

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Assistant Attorney General

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Director

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May 14, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on May 14, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for all parties.

/s/ P. Davis Oliver